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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. COLIN JON KOOYUMJIAN, Defendant and Appellant.	F069218 (Super. Ct. No. F12906267) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Fresno County. Jonathan M. Skiles, Judge.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez and Amanda D. Cary, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Gomes, Acting P. J., Detjen, J. and Franson, J.

Appellant Colin Jon Kooyumjian pled no contest to driving with a blood alcohol content (BAC) of .08 or greater causing injury (count 1/Veh. Code, § 23153, subd. (b)), driving under the influence causing injury (count 2/Veh. Code, § 23153, subd. (a), and leaving the scene of an accident (count 3/Veh. Code, § 20001, subd. (a)).

On appeal, Kooyumjian contends: (1) the court abused its discretion when it denied his motion for a continuance; and (2) the sentence imposed on count 2 violates Penal Code section 654's[1] prohibition against multiple punishment. We find merit to Kooyumjian's second contention and stay the sentence imposed on count 2. In all other respects, we affirm.

FACTS

On August 16, 2012, shortly before 4:30 p.m., Gail Harootunian was driving southbound on Clovis Avenue in Fresno when her vehicle was struck on the driver's side front fender by a vehicle driven by Kooyumjian as it traveled south. Harootunian injured her hand and scraped her knee.

Kooyumjian drove his vehicle away from the scene of the accident through a dirt field. Shortly afterwards a citizen reported to police seeing a parked vehicle with significant driver's side damage and the driver examining the damage while talking on a cell phone. Officers responded to the location and observed Kooyumjian holding a 24-ounce can of beer. Kooyumjian's eyes were bloodshot and watery. His speech was slurred and he had a strong odor of alcohol on his breath. Kooyumjian told the officers that he had just been involved in an accident and that the other driver fled from the scene. He did not know what happened except that somebody hit his vehicle. The officers transported Harootunian to where Kooyumjian was being detained and she positively identified his vehicle as the one that hit her vehicle.

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[1] All further statutory references are to the Penal Code.

During a postarrest interview, Kooyumjian stated that he was traveling southbound on Clovis Avenue when he was hit from behind. After the accident, he "blacked out" and woke up at the location where officers found him. He got out of his vehicle and drank a 24-ounce can of beer. He had just opened a second can when officers arrived. Kooyumjian denied drinking prior to the accident. However, a blood test determined that he had a blood alcohol content (BAC) of .25 percent.

Kooyumjian had two prior felony convictions for possession of a controlled substance, one in 2006 and another in 2007, that rendered him ineligible for a grant of probation absent the court finding unusual circumstances. (§ 1203, subd. (e)(4).) Kooyumjian's probation report concluded that there were no unusual circumstances that would allow the court to grant Kooyumjian probation.

During a probation department interview, Kooyumjian admitted that prior to the accident, he drank a bottle of tequila with his nephew because his father had died a few days earlier. Kooyumjian also claimed that his nephew was the one who was actually driving at the time of the accident but that he decided to take responsibility for it. The report also noted that Kooyumjian was suffering from cancer and that, according to Kooyumjian, his initial cancer diagnosis is what led to his controlled substance convictions.

On January 21, 2014, the district attorney filed an information charging Kooyumjian with the charges to which he pled.

On January 30, 2014, Kooyumjian entered his plea in this matter and admitted that at the time of the accident he had a BAC of .15 or greater. In exchange for his plea, the court agreed to a sentence lid of 16 months and to allow Kooyumjian to remain free on a *Cruz*[2] waiver so he could receive medical treatment for colon and abdominal cancer that had metastasized to his right lung.

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[2] *People v. Cruz* (1988) 44 Cal.3d 1247.

On March 3, 2014, the court granted Kooyumjian's oral request for a continuance based on his medical condition and it continued his sentencing hearing to March 26, 2014.

On March 25, 2014, defense counsel reviewed the probation report with Kooyumjian.[3]

On March 26, 2014, defense counsel made an oral request for a continuance. According to counsel, Kooyumjian had just picked up the probation report the previous day and he wanted to review it thoroughly with counsel because it contained several "inconsistencies" that he wanted the court to be aware of.

The court stated that it would allow Kooyumjian some time to review the report that morning but it would not continue the hearing. Defense counsel responded that Kooyumjian had attempted to pick up the probation report at defense counsel's office two days earlier but an office assistant erroneously advised him that it was not available. Afterwards, defense counsel called Kooyumjian and told him the report was available and he picked it up the following day.

The court responded that the case was originally set for sentencing on March 3, 2014, and that the report was available on that date. It reiterated that it was not granting a continuance and that if Kooyumjian wanted more time to review it, the court would give him more time to do so that morning. Defense counsel stated that Kooyumjian wanted to

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3 Defense counsel did not definitively state that she met with and reviewed the report with Kooyumjian on March 25, 2014. However, it can be inferred that she did from her ability at Kooyumjian's sentencing hearing to point out numerous alleged inaccuracies in the report that were based on information she could only have obtained from Kooyumjian. Additionally, we may base our statement of facts on factual concessions by the parties. (*People v. Wong* (2010) 186 Cal.App.4th 1433, 1438, fn. 2.) In his opening brief Kooyumjian concedes that defense counsel "*show[ed]*" him the probation report and "*confer[red]*" with him, on March 25, 2014. (Italics added.)

file a statement in mitigation and the court again stated that it was not granting a continuance.

Defense counsel did not accept the court's offer of additional time to review the report and instead advised the court of several alleged errors in the probation report. After hearing from the victim and from Kooyumjian, the court stated,

> "Well on Page 4 of [the probation report] it started out with you being contacted by law enforcement after the accident with a freshly open beer being consumed, which in this Court's experience is somebody [t]rying to deteriorate [sic] a rising blood alcohol defense. In addition to that, you didn't take responsibility. You told the officers that you were a victim of a hit and run. And then, quite frankly, I'm inclined to believe the probation officer over you, Mr. Kooyumjian, as to what you said to them during the generation of the report about trying to blame it on your nephew instead of taking responsibility then. Quite frankly, at this point, I'm not going to be accepting any other excuses or attempts to shift blame or mitigate the conduct.
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> "In this matter it is not a probation case. This is the third felony before this Court since 2006. Probation is presumptively ineligible or prohibited unless there is a finding of unusual circumstances, and this Court finds no unusual circumstances."

The court then imposed the mitigated term of 16 months on Kooyumjian's conviction in count 1 and concurrent 16 month terms on each of his remaining convictions.

DISCUSSION

The Denial of Kooyumjian's Motion for a Continuance

Kooyumjian contends that the "facts of his condition and treatment, as well as his future prospects, were peculiarly within his knowledge" as were alleged "inaccuracies in the probation report[.]" He further contends that "[b]ecause of those considerations, although counsel was given the probation report on March 3, 2014, she was not afforded time to prepare an effective statement in mitigation, since she did not show the report to appellant, and confer with him, until the day before the [sentencing] hearing." Thus,

according to Kooyumjian, "[c]onsidering the unusual facts of this case, the denial of appellant's request for a continuance to prepare a statement in mitigation was an abuse of discretion." Kooyumjian is wrong.

"A continuance in a criminal case may be granted only for good cause. ([Pen. Code,] § 1050, subd. (e).) Whether good cause exists is a question for the trial court's discretion. [Citation.] The court must consider '"'not only the benefit which the moving party anticipates but also the likelihood that such benefit will result, the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion.'"' [Citation.] While a showing of good cause requires that both counsel and the defendant demonstrate they have prepared for trial with due diligence [citation], the trial court may not exercise its discretion 'so as to deprive the defendant or his attorney of a reasonable opportunity to prepare.' [Citation.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 450.)

"A reviewing court considers the circumstances of each case and the reasons presented for the request to determine whether a trial court's denial of a continuance was so arbitrary as to deny due process. [Citation.] Absent a showing *of an abuse of discretion and prejudice*, the trial court's denial does not warrant reversal." (*People v. Doolin*, *supra*, 45 Cal.4th at p. 450, italics added.)

The only reasons presented to the court for continuing the hearing on March 26, 2014, were that Kooyumjian wanted to "thoroughly review" the report with defense counsel for alleged inaccuracies and Kooyumjian wanted defense counsel to file a statement in mitigation on Kooyumjian's behalf. However, Kooyumjian was out of custody on a *Cruz* waiver when defense counsel obtained a copy of the probation report on March 3, 2014. Thus, Kooyumjian had ample time to obtain a copy of the report and review it with counsel and counsel had ample time to prepare a statement in mitigation prior to the March 26, 2014, sentencing hearing. Further, Kooyumjian did not explain why he waited until March 24, 2014, to attempt to obtain a copy of the report.

In any event, on March 25, 2014, Kooyumjian obtained a copy of the probation report and reviewed it with defense counsel. Further, even though on March 26, 2014, defense counsel implicitly rejected the court's offer of additional time to review the report, during Kooyumjian's sentencing hearing that day, counsel pointed out numerous alleged errors in the report. It can reasonably be inferred from counsel's rejection of additional time to review the probation report and her identification of numerous alleged errors in it that Kooyumjian had sufficient time to review the report with counsel for potential errors. Thus, Kooyumjian's professed need to review the report for potential errors did not provide good cause to continue Kooyumjian's sentencing hearing.

Nor did Kooyumjian's desire to file a statement in mitigation provide good cause to continue his sentencing hearing. Kooyumjian's two prior felony convictions rendered him ineligible for a grant of probation absent the court finding unusual circumstances. (§ 1203, subd. (e)(4).) Facts that show an unusual case are classified into two groups: (1) "fact[s] or circumstance[s] indicating that the basis for the statutory limitation on probation, although technically present, is not fully applicable to the case," (Cal. Rules of Court, rule 4.413 (c)(1)), and (2) "fact[s] or circumstance[s] not amounting to a defense, but reducing the defendant's culpability for the offense." (Cal. Rules of Court, rule 4.413(c)(2).)

Defense counsel did not need the probation report in order to interview Kooyumjian to determine if there were any circumstances, including any related to his medical condition, that she believed were unusual and reduced Kooyumjian's culpability for his offenses. Thus, she had plenty of time prior to the sentencing hearing to interview Kooyumjian and prepare a statement in mitigation. Further, the failure of defense counsel or Kooyumjian to argue to the court that there existed unusual circumstances that reduced his culpability for his offenses can only be construed to mean that there were none. Moreover, since Kooyumjian's plea limited his possible sentence to probation or a 16-month term, and probation was not an option because of the absence of unusual

circumstances, there was no reason to continue the sentencing hearing to allow defense counsel time to file a statement in mitigation. Thus, we conclude that Kooyumjian failed to show good cause to continue his sentencing hearing or prejudice from the failure to grant the continuance.

Kooyumjian misplaces his reliance on *People v. Jacobs* (2007) 156 Cal.App.4th 728 (*Jacobs*) to argue that the court abused its discretion when it denied his request for a continuance. In *Jacobs*, after a jury convicted the defendant on four felony counts, the trial court and the parties agreed to a sentencing date. On that day, unbeknownst to the defendant, the judge who presided over his trial was gone from the court and would not return for two days. Nevertheless, over a defense objection, the court sentenced the defendant that day.

The *Jacobs* court treated the defendant's objection to being sentenced by a different judge as a request for a continuance for two days so that the trial judge could sentence the defendant. In finding that the trial court abused its discretion by not granting the two-day continuance, the *Jacobs* court stated:

> "While defendant had no *right* to be sentenced by [the first judge], it is well recognized that the strongly preferred procedure was for him to impose sentence. We recognized this very point long ago, in *People v. Cole* [1960] 177 Cal.App.2d [458,] 460, where we noted as follows: 'In our judgment it is normally the better procedure for the judge who tried the case and is presumably familiar with the course of the trial and the demeanor of the witnesses to act on the matter of probation and sentence, but we agree with the holding of the court in *Connolly*[, *supra,* 103 Cal.App.2d 245] that there is no error in another judge of the court performing that function.' Indeed, the prosecutor here recognized this strong preference, agreeing with defendant's counsel and advising Judge Kroyer that 'I think the court's preference to do it on the day it was scheduled is outweighed by the fact that there is a very strong preference by the judicial system that the trial judge do the sentencing.' We, too, agree, and hold that this preferred procedure should have been followed here." (*Jacobs*, *supra*, 156 Cal.App.4th 728, 738.)

Kooyumjian analogizes his case to *Jacobs* in arguing that while a defendant does not have an absolute right to a continuance to examine his probation report and to refute statements in it, the better practice is to permit the defendant time to examine it. His analogy is not well taken.

The instant case does not invoke the "very strong preference by the judicial system that the trial judge do the sentencing" (*Jacobs*, *supra*, 158 Cal.App.4th at p. 738) or any other policy reason that supported a grant of a continuance. Further, Kooyumjian's analogy is based on a false premise that we already rejected, i.e., that he did not have adequate time prior to his sentencing hearing to review and discuss the probation report with defense counsel. Accordingly, we conclude that the court did not abuse its discretion when it denied Kooyumjian's request for a continuance.

The Section 654 Issue

Kooyumjian contends the court violated section 654's prohibition against multiple punishment when it imposed a concurrent term on his conviction in count 2 for driving under the influence of alcohol causing injury. Respondent concedes and we agree.

"Section 654 precludes multiple punishment for a single act or omission, or an indivisible course of conduct. [Citations.] If, for example, a defendant suffers two convictions, punishment for one of which is precluded by section 654, that section requires the sentence for one conviction to be imposed, and the other imposed and then stayed. [Citation.] Section 654 does not allow any multiple punishment, including either concurrent or consecutive sentences." (*People v. Deloza* (1998) 18 Cal.4th 585, 591-592.)

Here, Kooyumjian's convictions in count 1 for driving with a BAC of .08 or greater causing injury and in count 2 for driving under the influence of alcohol causing injury were based on the same conduct of hitting another vehicle and injuring the driver while driving with a BAC of .25. Therefore, since the court imposed a 16-month term on

count 1, it violated section 654's proscription against multiple punishment when it imposed a concurrent 16-month term on count 2.

DISPOSITION

The judgment is modified to stay the term imposed on count 2. The trial court is directed to prepare an amended abstract of judgment that incorporates this modification and to forward a certified copy of the abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.